In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-809

CHARLES PERMISOHN AND ENRIQUE MONIER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In a four-count indictment returned in the United States District Court for the Southern District of New York, petitioners were charged with engaging in the business of dealing in firearms (starter pistols which were readily convertible to fire live ammunition) without a license, in violation of 18 U.S.C. 922 (a)(1), (Count 2); possessing unregistered firearms (starter pistols already thus converted) made in violation of 26 U.S.C. 5822, in violation of 26 U.S.C. 5861 (c) and (d), (Counts 3-4); and conspiracy to commit these offenses (Count 1). After jury trial they were convicted on all four counts. Petitioner

493-777—73——1

Permisohn was sentenced to concurrent six month terms of imprisonment on each count and petitioner Monier was placed on two years' probation as a youthful offender. The court of appeals affirmed without opinion on October 5, 1972 (Pet. App. A). On November 3, 1972, Mr. Justice Marshall entered an order extending the time for petitioner Permisohn to file a petition for a writ of certiorari to December 4, 1972, the date on which the instant petition was filed. No such extension was granted to petitioner Monier. Accordingly, as to him the petition for a writ of certiorari is out of time under Rule 22(2) of the Rules of this Court.

1. The evidence showed that in late 1969, acting under the direction of agents of the Alcohol, Tobacco and Firearms Division of the Treasury Department, undercover informant Saulo Ortiz purchased from one Ruperto Rios three starter pistols converted by Rios to permit the firing of a bullet. Rios had purchased the starter pistols from petitioner Permisohn at his store, Charlie's Bargain Store (Tr. 17, 189–194, 198–200, 236, 286, 488–492). Thereafter on February 27, 1970, Treasury agents sent Ortiz to Permisohn's store to attempt to purchase pistols. Petitioner Monier, an employee in the store, instructed Ortiz to return the next day because Permisohn was not in (Tr. 19–21, 62–63, 154–155, 237). Returning the next day, Ortiz gave Monier a hand signal previously shown to Ortiz by a Treasury agent (Tr. 22–24, 65). Permisohn, seeing this signal, instructed Monier "to take care of [Ortiz]." Monier sold Ortiz one starter pistol which he brought from the back of the store

(Tr. 22–24, 65, 76–77, 151, 171–172, 238–241). In response to Ortiz' inquiry, Monier stated that Permisohn would not convert the pistol. However, Monier then explained to Ortiz how to perform the conversion himself by drilling out the cylinder and cutting the barrel behind the plug (Tr. 25, 28, 89, 177, 179).

Ortiz returned to Permisohn's store on March 5, gave the same hand signal, and purchased two more starter pistols (Tr. 30–31, 82, 174–175, 239, 242–244).

On March 10 two Treasury agents entered Permisohn's store and, without giving the hand signal, sought to purchase starter pistols; Permisohn told them that he did not stock such pistols (Tr. 245–246, 373–376). Two days later Ortiz again was sent into the store to buy more pistols. Permisohn told Ortiz that his volume of sales had been so large that he could only sell him ten pistols and instructed Ortiz to return the next day. When Ortiz arrived the next day, Permisohn said that he had the guns. Ortiz left, ostensibly to bring his car to the front of the store; Treasury agents then moved in, arrested Permisohn and Monier, and conducted a search which uncovered 17 unconverted and three converted Italian import starter pistols and 450 rounds of .22 caliber ammunition (Tr. 33–34, 124–125, 247–251, 414).

The three converted starter pistols were test fired and found to be operable (Tr. 374). A firearms expert, using nails and an ordinary electric drill, converted two of the seized unconverted starter pistols. Each conversion required five to ten minutes, "some of which time was used in trying to figure out how * * * to handle the problem" (Tr. 387, 393, 395, 400, 404).

2. Petitioners' contention that the instant prosecution was beyond federal jurisdiction is without merit. Counts 3 and 4 of the indictment charged violations of 26 U.S.C. 5861(c) and (d), which are part of the Internal Revenue Code and thus represent a valid exercise of the taxing power granted Congress by the Constitution (Art. I, § 8, cl. 1).

Count 2 charged unlicensed dealing in firearms, in violation of 18 U.S.C. 922(a)(1). The unambiguous language and punctuation of this statute, together with the relevant legislative history, clearly show that it was intended to prohibit all unlicensed dealing in firearms irrespective of any nexus between a particular firearm and interstate or foreign commerce. See *United States* v. *Ruisi*, 460 F. 2d 153 (C.A. 2), certiorari denied, October 16, 1972 (No. 72–142); see also 1968 U.S. Code Cong. & Admin. News, pp. 2114, 2202, 4418.

Petitioners' reliance on *United States* v. *Bass*, 404 U.S. 336, in arguing that such a nexus should be essential to a conviction in each case, is misplaced. *Bass* dealt with another, differently worded statute, 18 U.S.C. App. 1202(a)(1). In *Bass*, this Court, emphasizing the ambiguity of that statute and the lack of a definitive legislative history, concluded that the phrase "in commerce or affecting commerce" appearing in the statute applied to all three antecedents, "receives, possesses, or transports," rather than solely to the last antecedent, "transports." 404 U.S. at 339–347. Thus a connection with interstate or foreign commerce was found to be an essential element of an offense under that statute. Here, in contrast, "[i]t is impossible to

read the statute except as demonstrating that Congress intended to make unlawful unlicensed dealing in firearms whether interstate or intrastate." *United States* v. *Ruisi, supra,* 460 F. 2d at 156. The further contention that, as so interpreted, 18 U.S.C. 922(a)(1) impinges upon the powers reserved to the states, is without merit in view of the principles enunciated by this Court in *Perez* v. *United States,* 402 U.S. 146. See also *United States* v. *Nelson,* 458 F. 2d 556, 559 (C.A. 5); *United States* v. *Crandall,* 453 F. 2d 1216, 1217 (C.A. 1).

3. Petitioners further contend that the phrase "may readily be converted to expel a projectile" appearing in the statutory definition of a "firearm" (18 U.S.C. 921(a)(3)) is too vague to indicate to "men of common intelligence" which types of starter pistols may not be sold without a license (Pet. 5–7).[1] This contention is insubstantial as it ignores the evidence in the case and misinterprets the elements of an offense under 18 U.S.C. 922(a)(1). The act conveys clear notice to dealers and importers in firearms that a license is required to deal in readily convertible starter pistols. The evidence showed that two of the starter pistols seized from Permisohn's store were converted into instruments capable of discharging projectiles in a

[1] 18 U.S.C. 921(a)(3) provides in pertinent part, as follows: "The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive * * *." Petitioner erroneously interprets this statute to mean "is designed to * * * be converted" (Pet. 6). The phrase "is designed to" does not relate to the phrase "readily be converted," but is properly read, "is designed to * * * expel a projectile."

period of five to ten minutes using ordinary tools obtainable at a hardware store. "Reasonable men would surely agree that guns which can be so quickly transformed into dangerous weapons are 'readily convertible' * * *." *United States* v. *16,179 Moslo Italian .22 Caliber Winlee Derringer Convertible Starter Guns,* 443 F. 2d 463, 466 (C.A. 2). Moreover, at the time of Ortiz' original purchase, petitioner Monier explained the technique involved in converting the starter pistol to fire a bullet, and the search of the store conducted incident to petitioners' arrest uncovered three starter pistols already thus converted (Tr. 25, 28, 179, 248).[2] From this evidence one could infer that both petitioners knew that the starter pistols were readily convertible; they are thus in no position to contend that they failed to comprehend the proscription of the statute.

Moreover, 18 U.S.C. 922(a)(1) does not require scienter or guilty knowledge to convict. The proper purpose of the statute is to keep such potentially dangerous weapons out of the hands of unlicensed dealers. Thus "[a]nyone who engages in the business of importing [or dealing in] such devices as starter guns properly is held bound to know or to inquire as to their potential convertibility into dangerous weapons." *United States* v. *16,179 Molso Italian .22 Caliber Winlee Derringer Convertible Starter Guns, supra,* 443 F. 2d at 466; see also *United States* v. *Quiroz,* 449 F. 2d 583,

[2] We note also petitioner Permisohn's testimony at the trial that "if [Ortiz] said he was going to convert it, I wouldn't have sold it to him" (Tr. 675) which seemed to imply an awareness that the pistols sold to Ortiz could be readily converted.

585 (C.A. 9); *United States* v. *Ruisi, supra,* 460 F. 2d at 156.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

[2] In any event, the convictions on Counts 3 and 4 were based on the three converted starter pistols found in Permisohn's store. As to those counts no issue of guilty knowledge of convertibility can be involved. The sentences on all four counts were concurrent.

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